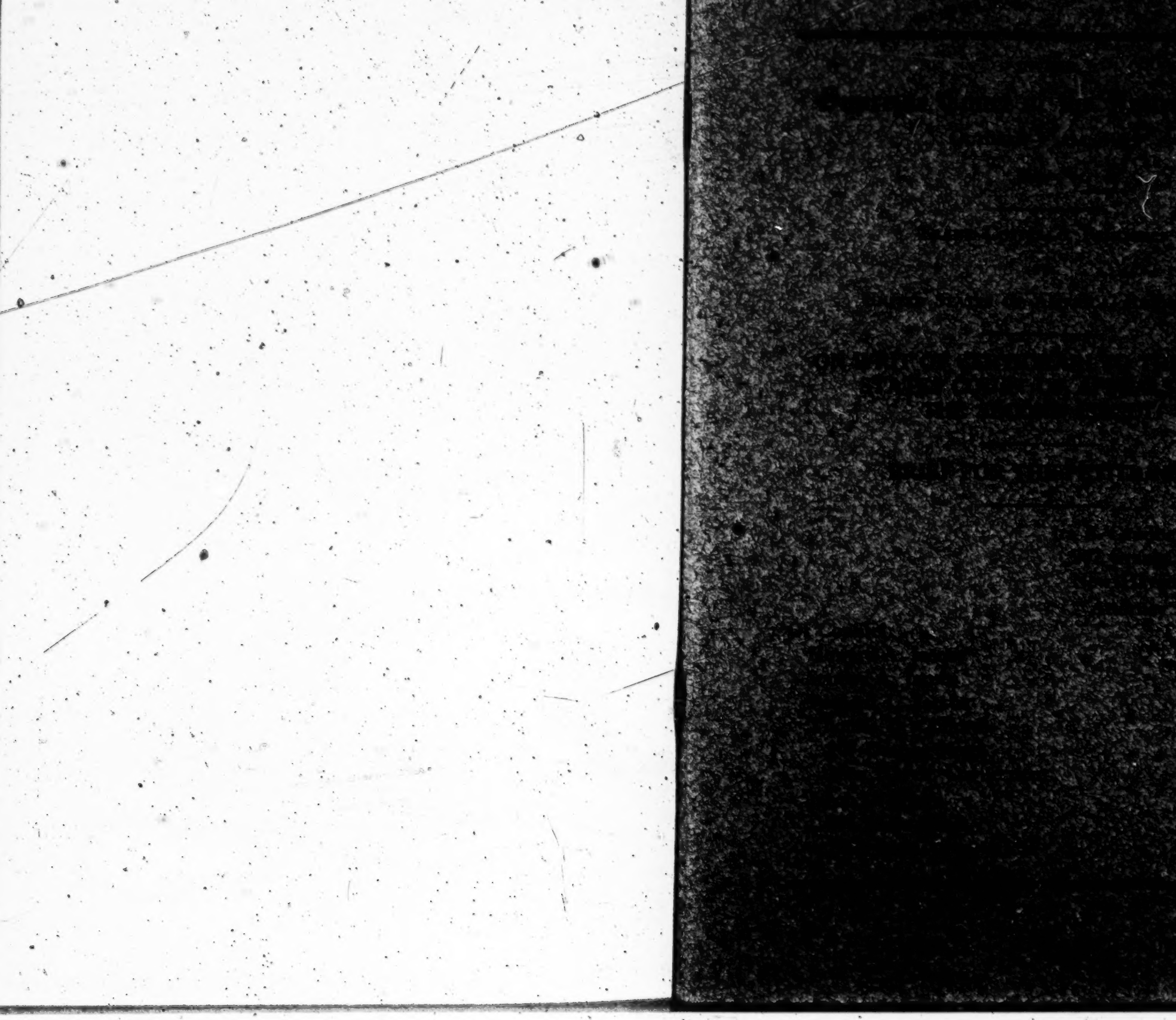

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 41

FRANK COSTELLO, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

STATEMENT OF THE CASE

On October 6, 1964, a federal grand jury convened for the United States District Court for the District of Connecticut returned two indictments against the Petitioner Frank Costello. In the first, he was charged, along with two others,[1] with having conspired to violate 26 U. S. C. §7203 by not paying the special wagering occupational tax imposed by 26 U. S. C. §4411. (R. 1). In the other indictment, Costello was charged, in two substantive counts, with having violated Section 7203 by engaging in the business of receiving wagers having "wilfully failed prior" (1). to pay

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[1] James Marchetti and Carl Gjanci, whose petitions for *certiorari* are presently pending before, and awaiting action by, this Court.

the "special occupational tax" required by 26 U. S. C. 4411, and (2) to "register" as required by 26 U. S. C. 4412. (R. 3) The two alleged co-conspirators were similarly charged in separate indictments, and all charges were consolidated, upon motion of the government, for a single trial.

After a jury verdict of guilty, Costello and the other accused filed timely motions in Arrest of Judgment and to Dismiss Indictment raising the claim that the occupational tax and registration provisions were violative of the Fifth Amendment protection against self-incrimination. (R. 5-9) The trial court denied the motions and, on January 11, 1965, ordered Petitioner imprisoned for one year and imposed a fine of Ten Thousand ($10,000.00) Dollars. (R. 9-12)

Petitioner appealed to the Court of Appeals for the Second Circuit; that court, on October 29, 1965, affirmed the District Court judgment. Immediately after this Court decided *Albertson v. Subversive Activities Control Board,* 382 U. S. 70 (1965), Petitioner asked the Court of Appeals to rehear the self-incrimination aspect of the case, but the court declined, noting by reference that while "the rationale of *Albertson* . . . may lead the Supreme Court to overrule its previous decisions in . . . *Kahriger* . . . and . . . *Lewis,* insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination, we consider that issue more appropriate for that Court's determination."

Costello filed his Petition for Certiorari on December 16, 1965; the Court, on March 21, 1966, granted the petition limited to the single question of whether this court should overrule its earlier holdings, in *Kahriger* and *Lewis,* that the federal wagering tax statutes do not violate the Fifth Amendment's privilege against self-incrimination.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, on October 29, 1965, affirming petitioner's conviction appears as *United States v. Costello,* 352 F. 2d 848 (2 Cir. 1965). The Court of Appeals also, on November 26, 1965, denied Costello's petition for rehearing without opinion, but referred therein to its opinion in *United States v. Grassia,* 354 F. 2d 27 (2 Cir. 1965). That opinion, in relevant part, is reprinted in Appendix A, *infra.*

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. Sec. 1254 (1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This appeal involves the Fifth Amendment, United States Constitution; Title 26 U.S.C. §§ 4401 through 4423, 4901, 6011 and 7203. Also involved are numerous Connecticut statutes proscribing various forms of gambling activity. All of the federal statutes and a representative selection of the Connecticut statutes are reprinted in Appendix B, *infra.*

QUESTION PRESENTED

"Do not the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this court, especially in view of its recent decision in *Albertson* vs. *Subversive Activities Control Board* 382 U.S. 70 (1965), overrule *United States* v. *Kahriger,* 345 U.S. 22 (1953) and *Lewis* vs. *United States,* 348 U.S. 419 (1955)?"

SUMMARY OF AGREEMENT

The federal wagering tax laws are a well integrated series of statutes. They provide not only for registration and payment of a "special tax" prior to entering the business of gambling, but also for compulsory answers to questions concerning present and past behavior, criminal under the law of almost all states, later supplemental reporting highly incriminating in nature, and the exposing of books and records to the Internal Revenue Service.

The prior decisions of this Court, in *United States v. Kahriger,* 345 U. S. 22 (1953) and *Lewis v. United States,* 348 U. S. 419 (1955) looked almost solely to the condition precedent requirement of the special tax to the exclusion of the more obviously incriminating aspects of the legislation and Internal Revenue form. The Court also defined the protection afforded by the privilege in an unduly restrictive manner.

The recent decision in *Albertson v. Subversive Activities Control Board,* 382 U. S. 70 (1965) virtually demands reversal here, and overruling of *Kahriger* and *Lewis.* Petitioner clearly has standing to raise the privilege without having filled out the registration form, as this area of regulation is one "permeated by criminal statutes." The approach of the *Albertson* Court in looking to the actual content of the registration form leads to the inescapable conclusion that compliance with 26 U. S. C. §§ 4411 and 4412 tends to incriminate the registrant concerning past conduct. Even if the plain language of the registration form is ignored, and registration is deemed totally prospective, required statements as to "future intent" would nonetheless tend to incriminate the taxpayer as to past acts.

The privilege, when disclosures are compelled in an area where all activity is criminal, should not be limited only

to past acts. The *Kahriger* Court's reliance upon Wigmore in stating such a principle was misplaced. Such a rule, if exploited by cleverly drawn legislation, as is here before the Court, would lead to total emasculation of the privilege. For instance, there is no conceivable purpose served by the "condition precedent" aspect of this legislation other than subversion of the privilege—which has been singularly successful thus far.

There is no question that, even assuming existing law would be correct in a vacuum, it has in fact been used to convict people of criminal acts by use of information forced from them under threat of criminal sanction. Such a result represents an eroding away of the precious privilege; that erosion should continue no longer.

ARGUMENT

I. THE REGULATORY FRAMEWORK OF THE WAGERING TAX STATUTES

Petitioner presently stands convicted, on both substantive and conspiracy charges, of having violated 26 U.S.C. §7203, a general penalty statute, which makes it a crime wilfully to fail to pay any tax imposed by Congress in Title 26, or wilfully to fail to "make any return . . . keep any records, or supply any information . . . required by law. . . ." In this case, of course, the indictment charged specifically an alleged failure to comply with a number of sections of Chapter 35 of the Internal Revenue Code, "Taxes on Wagering."

Although, in *United States v. Kahriger,* 345 U.S. 22 (1953), this Court upheld the wagering tax provisions against an argument that Congress had unconstitutionally used the taxing power to regulate conduct subject solely to state control, it was conceded that the taxes involved have

"a regulatory effect" and doubtless act to "discourage or deter" gambling activity. 345 U.S. 22, at 28. To understand the impact of the wagering tax provisions upon the Fifth Amendment's privilege against self-incrimination, we must examine Chapter 35 as a single integrated unit, and view the individual statutory provisions taking into consideration their relationship with each other.

Section 4401 of Title 26 imposes an excise tax of 10 percent on all wagers (save for certain betting transactions exempted by 4402) which tax must be paid by "each person who is engaged in the business of accepting wagers" and by "each person who conducts any wagering pool or lottery". In addition to the excise tax on the actual wagers, Section 4411 imposes a "special tax of $50.00 per year to be paid by each person who is liable for tax under Section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable". The special tax must be paid before the gambler goes into business. 26 U.S.C. §4901. Hand in hand with the "special tax" is the registration provision of 4412 requiring any person liable to pay the $50.00 also to provide the Internal Revenue Service with certain details of his "operations". Section 4412 has been implemented by Internal Revenue Service Form 11-C, Special Tax Return and Application for Registry, which, after demanding an answer to the query, "Are you engaged in the business of accepting wagers on your own account?", continues to elicit detailed information as to the people with whom the taxpayer-registrant is doing business. (R. 7)[2]

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[2] See *United States v. Whiting*, 311 F.2d 191 (4 Cir. 1962) where the I.R.S. refused to issue an "occupational tax stamp" when the taxpayer tendered the $50.00 "special tax" but failed to execute a registration statement, and *United States* v. *Mungiole*, 233 F.2d 205 (3 Cir. 1956) where a tender of the tax, without registration, was held to be no defense to a subsequent prosecution for failing to pay the tax.

Section 6011 of Title 26 supplies to the Secretary of the Treasury, or his delegate, the authority to require of any taxpayer, "return[s] or statment[s] according to forms and regulations prescribed" by them. Form 11-C has been so prescribed by the I.R.S. and, in addition to the original registration form, the "taxpayer" must, *within 10 days after starting to do business* with a new employee or employer, file a "Supplemental" Form 11-C reporting that information. 26 C.F.R. §44.4412-1.

The *active* registration requirements of Chapter 35 far from exhaust its self-incriminating potential; Section 4423 decrees that "the books of account of any person liable for (wagering) tax . . . may be examined and inspected as frequently as may be needful to the enforcement of this chapter". It is clear that, in addition to using information obtained for the purpose of enforcing the tax, the I.R.S. feels it proper and desirable to turn over the same information to local and state law enforcement officials so that the "taxpayer" might be duly convicted on state gambling charges—it has proudly trumpeted that fact. Caplan, The Gambling Business and Federal Taxes, Journal of Crime and Delinquency, Vol. 8 (1962) pg. 697. Against this backdrop of "friendly cooperation", Chapter 35 is then neatly rounded out by Section 4422, in which Congress specifically provides that payment of the wagering tax "shall not exempt any person from any penalty provided by a law of the United States or of any state for engaging in the same activity . . ."

This court, a decade ago, in *United States v. Kahriger, supra* and *Lewis v. United States,* 348 U.S. 419 (1955), held that the foregoing statutory scheme was not violative of the privilege against self-incrimination; we ask the Court now to reconsider those holdings.

II. KAHRIGER AND LEWIS REVISITED

A challenge to the constitutionality of the wagering tax provisions was first brought before this Court in *United States v. Kahriger,* 345 U. S. 22 (1953). There, the major portion of the Court's opinion dealt with defendant's contention that the legislation was not a true exercise of the Congressional taxing power, but rather an illegal attempt to penalize intrastate gambling activity, the regulation of which had been constitutionally left solely to the states. When the Court did pass on to the Fifth Amendment challenge, it disposed of it rather summarily.

First, the majority expressed doubt that the accused had standing to raise the self-incrimination argument. Citing the following language from *United States* vs. *Sullivan,* 274 U.S. 259, at 263, "If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all", the Court commented that, in view of the failure of the accused to register at all, "it is difficult to see how he can now *claim the privilege*". 345 U.S. at page 32. (Emphasis added)

The Court continued, without specifically holding that defendant lacked standing to raise the self-incrimination issue, to dispose of the claim on the merits. The majority, in this regard, stated very briefly,

> "Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions." 345. U.S. at pages 32-3. (Emphasis added)

Two years after *Kahriger,* in *Lewis* vs. *United States,* 348 U.S. 419 (1955), the Court expanded somewhat on its cryptic holding, in *Kahriger,* that a registrant need not "confess" to any crimes—only "fulfill certain conditions" before engaging in wagering. Reading Sections 3271 and 3290[3] of the 1939 Internal Revenue Code in tandem, the Court stated, "it seems clear that payment of the special $50 tax is to be made prior to engaging in the business of accepting wagers." 348 U.S. at page 421.

The Court pointedly stressed the word *compelled* in its definition of the scope of the Fifth Amendment guarantee. 348 U.S. at page 421. Expanding upon that theme, the majority went on to state that the fact that a gambler "may elect to pay the tax *and make the prescribed disclosures required by the Act* is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment. . . . The only compulsion under the Act is that requiring the decision which would-be gamblers must make at the threshold. They may have to give up gambling, but there is no constitutional right to gamble." 348 U.S. at page 422.

Passing on, finally, to petitioner's claim that the purchase and required exhibition of the $50 stamp could furnish probable cause for issuance of a search warrant and thereby incriminate him, the Court, without citation of authority, curtly dismissed that contention based upon Lewis' very failure to purchase the stamp and register. "His complaint is that if he had one he might get in trouble. Since petitioner is without a stamp, he is not in a position to raise the

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[3] Sections 4401 and 4901 of the 1954 Code. Section 4901 presently lays out even more specifically than its 1939 precursor the "condition precedent" aspect of the special tax provision.

question as to what might happen to him if he had one." 348 U.S. at page 423.

In summary, the federal wagering tax laws, as preserved from constitutional attack in *Kahriger* and *Lewis,* have stood for a decade and a half on these underpinnings:[4]

1. The Court's holding that an accused, not having purchased a stamp or registered, cannot, in his criminal prosecution therefor "claim the privilege" or point to what might have happened had he complied with the law.

2. The Court's emphasis on the word "compelled" in the Fifth Amendment, and its holding that payment of the tax, the prescribed registration and disclosures are strictly "a matter of . . . choice with nothing compulsory about it". 348 U.S. at page 422.

3. An implication somehow based presumably upon the literal language of the Fifth Amendment, that only *testimonial* compulsion would be violative of the privilege.

4. The holding that, because present section 26 U.S.C. 4901 requires payment of the special tax *before* entering the "business of accepting wagers", all that is required by Chapter 35 is the disclosure of present intent to break the law, in the future, which disclosure, even if "compelled", cannot be deemed incriminating.

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[4] In *Kahriger,* the Court was not completely clear as to whether it was considering alleged self-incrimination under State or other federal laws. The government, however, argued that any possible incrimination would solely be under state law, *United States* v. *Lewis,* 348 U.S. 419, 423, fn. 1, and therefore not protected by the Fifth Amendment. *United States v. Murdock* 284 U.S. 141 (1931). To whatever extent *Murdock* was an implied basis for the *Kahriger* holding, this Court's decision in *Murphy v. Waterfront Commission* 378 U.S. 52 (1964) has undercut it.

We contend that *Kahriger* and *Lewis,* even when decided, were based on an unduly restrictive view of the privilege which this Court has called "an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized'.[5]" *Ullman v. United States,* 350 U.S. 422, 426 (1956). In its decisions of the last decade, however, this Court has made it clear that if the wagering tax statutes "would not violate the Fifth Amendment's privilege against self-incrimination, it is hard to think of anything that would". *United States v. Lewis,* 348 U. S. at page 425 (Black, J., dissenting)

III. THE WAGERING TAX STATUTES VIOLATE THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION

A. PETITIONER HERE HAS STANDING TO TO RAISE THE PRIVILEGE

Relying upon *United States v. Sullivan,* 274 U.S. 259 (1927), the Court in *Kahriger* intimated that one accused of criminally having failed to register and pay the special wagering tax could not then "claim the privilege" because of his very failure to comply with the tax and registration requirements; later, in *Lewis,* the Court squarely held that petitioner could not complain of the alleged self-incriminating effects of the legislation because he had, in fact, failed to comply. *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965) has now, however, completely undercut the "no standing" rationale of the earlier wagering tax cases.

In voiding the registration provisions of the Subversive Activities Control Act of 1950, the Court squarely met, and

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[5] Griswold, The Fifth Amendment Today (1955), 7.

disposed of, the government claim, based upon *Sullivan*, that petitioners lacked standing because of their failure to register and invoke the privilege on those specific questions claimed to be incriminating. The Court pointed out that while "In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large . . . here they are directed at a highly selective group inherently suspect of criminal activities." The claims of privilege in *Albertson*, unlike *Sullivan*, were "not asserted in an essentially non-criminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioner in the admission of a crucial element of a crime." 382 U.S. at page 79.

The instant case is clearly governed by *Albertson* rather than *Sullivan*. While petitioner has reproduced in his appendix only two of the blunderbuss Connecticut statutes prohibiting wagering and providing criminal penalties, this surely is "an area permeated with criminal statutes". §§53-271 to 53-279, 53-295 to 53-298, 54-197 (Conn.Gen. Stats., 1958 Rev.) An answer to virtually any one of the questions on I.R.S. Form 11-C (R.7) would involve an "admission of a crucial element of a crime". Even payment of the special tax without registration at all, if that could legally be accomplished, might easily be used to incriminate, especially in a conspiracy prosecution. Surely petitioner must have the same standing to challenge the validity of the wagering tax statutes, without first confessing to a crime, as did the alleged Communist Party members in *Albertson*. Cf. *Jones v. United States*, 362 U.S. 257, 258-267 (1960).

B. THE WAGERING TAX PROVISIONS VIOLATE THE FIFTH AMENDMENT PRIVILEGE NOTWITHSTANDING THE STATUTORY REQUIREMENT THAT THE SPECIAL TAX BE PAID BEFORE ENTERING INTO THE BUSINESS OF ACCEPTING WAGERS

In both *Kahriger* and *Lewis*, the Court leaned heavily on the fact that Sections 3290 and 3271 of the 1939 Code required payment of the special $50 tax before venturing into the business of accepting wagers. Centering solely upon this single aspect of the entire group of wagering tax statutes, combined with the brief statement in *Kahriger* that the privilege applied "only to past acts, not to future acts that may or may not be committed", 345 U.S. at page 32, led the court to the conclusion that the privilege had not been violated—that perhaps the "would be gambler . . . may have to give up gambling, but there is no constitutional right to gamble". *United States* v. *Lewis, supra.* at 422; see also dissent of Mr. Justice Black at page 425. We submit that all the Court's premises in the earlier cases—(1) the single minded preoccupation with the condition precedent aspect of the special tax; (2) the conclusion that the payment and registration *must* only relate to future conduct; and (3) the "rule of law" that the privilege *necessarily applies only to past acts*—were wrong.

1. In Measuring The Constitutional Validity Of The Wagering Tax Provisions The Court Must Look To The Entire Statutory Scheme

A reading of *Kahriger* and *Lewis* would almost leave one with the impression that the *only* thing a prospective "taxpayer" need do, under the wagering tax provisions, is pay the special tax of $50 before starting his "business". That of course is not at all what this package of legislation provides. Payment of the special tax is only the first requirement in a compulsory series of steps demanding that the

citizen furnish the sovereign with information with which the sovereign may incriminate and incarcerate the citizen. These statutory and regulatory demands are set forth in detail, *supra,* and little would be served by repeating them here. It is a virtual impossibility, however, for a taxpayer to comply with all the statutory requirements without incriminating himself—as to past and present behavior.[6]

To look only to the special tax provision is to ignore the real violence done to the Fifth Amendment right by the entire legislation. As with the Subversive Activities Control Act, there is nothing in this "Act or regulation (which) permits less than literal and full compliance with the requirements of the form" or other disclosure provisions. *Albertson* v. *Subversive Activities Control Board,* 382 U.S. at 78. The Internal Revenue Service considers the special tax payment and the completion of Form 11-C as inseparable. In *United States* v. *Mungiole,* 233 F.2d 205 (3 Cir. 1956), the accused had tendered the $50 which was refused because, relying upon the privilege, he had refused to register. His subsequent conviction for accepting wagers without payment of the tax was affirmed by the Third Circuit, which held that tender of the tax, without registration, was ineffective. Cf. *United States* v. *Whiting,* 211 F.2d 191 (4 Cir. 1962).

Further, if the cases dealing with the testimonial privilege are a valid guide, the payment of the tax would probably be deemed a waiver of the privilege, *Caminetti* v.

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[6] Where a registration statute calls for information which would be incriminating as to present status or past conduct, the lower courts have had no difficulty with "standing"—and have dismissed prosecutions brought for failure to register. *Russell* v. *United States,* 306 F.2d 402 (9 Cir. 1962); *Dugan* v. *United States,* 341 F.2d 85 (7 Cir. 1965); *United States* v. *Fleish,* 227 F.Supp 967 (E.D. Mich. 1964).

United States, 242 U.S. 470,492-5 (1917), *Raffel* v. *United States,* 271 U.S. 494 (1926), *Rogers* v. *United States,* 340 U.S. 367 (1951), thereby demanding total compliance, the privilege no longer being available, with registration under 4412, with the "open book" provision of 4423, and with the subsequent reporting required by 26 C.F.R. §44.4412-1 (b) (2) and (3).

Although concededly *Albertson* dealt with compelled disclosures which could more clearly incriminate as to past acts, the approach of the court in looking to the *entire* legislation, along with forms issued pursuant to the regulations, leads us here to the same conclusion—the taxpayer-registrant is compelled by threat of criminal sanction to disclose that which inevitably would tend to incriminate him.

2. However Prospectively Interpreted, Payment Of The Special Tax And Registration May Tend To Incriminate The Taxpayer As To Past Acts

We here assume, for purpose of argument, that, in measuring the wagering tax provisions against the yardstick of the Fifth Amendment privilege, it is valid, notwithstanding the clear language of the registration form and Tax Return, to consider the wagering tax requirements purely prospective.[7] Even if that is done, that requirement, coupled with the criminal penalty of 26 U. S. C. 7203 for

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[7] Although *Kahriger* and *Lewis* seemed to ignore the registration provision, or at least the registration form, it has been held that registration also is totally "prospective". *United States v. Cefalu,* 338 F.2d 582 (7 Cir. 1964). That is difficult to reconcile with Form 11-C and the questions therein, e.g. *"Are* you engaged in the business. . . ." etc. At any rate, registration here *inevitably* leads to incrimination under the Supplementary Registration and disclosure provisions. 26 U.S.C. Sec. 4423; 26 C.F.R. §44.4412-1.

wilful failure to comply, violates the privilege against self-incrimination.

One of the most striking things about both the *Kahriger* and *Lewis* decisions is the Court's total failure to explain away some of our more significant Fifth Amendment decisions, *Counselman* v. *Hitchcock,* 140 U.S. 547,564 (1892), *Blau v. United States,* 340 U. S. 159 (1950), *Hoffman v. United States,* 341 U. S. 479 (1951). In those cases, the Court clearly held that the privilege extends not only to situations where an answer in itself could support a conviction, "but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."[8] *Hoffman v. United States,* 341 U. S. at 486. The test there established concerning the validity of the claim of privilege was that "it need only be evident from the implications of the questions, in the setting in which it is asked, that a responsive answer or an explanation of why it cannot be answered *might* be dangerous because injurious disclosure *could* result". 341 U. S. at pages 485-6. Since *Hoffman,* the court has further defined this test. *Albertson* now clearly indicates that the "link-in-the-chain" test applies not only to disclosures evidentiary in themselves, but also to those things which might "at least supply investigatory leads to a criminal prosecution", 382 U.S. at page 78, while in *Malloy v. Hogan,* 378 U. S. 1, 13, the Court heavily weighed, as part of the "setting", the fact that the grand jury interrogation was part of a "wide ranging inquiry into crime, including gambling"—a fair characterization, we think, of the Kefauver Committee "investigation" which gave birth to the legislation now in question. *Malloy* further emphasized that the privilege

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[8] *Murphy v. Waterfront Commission, supra,* has of course extended that protection to state crimes.

must be upheld unless it is " ' "*perfectly clear* . . . that the answer (s) *cannot possibly* have such tendency' to incriminate." ' " 378 U.S. at 12

We are here dealing with a "tax" on a business which is carried on in an area "permeated with criminal statutes"—where the government clearly seeks incriminating information *at least* as much as revenue—and where, under *Albertson, Malloy* and *Hoffman* every reasonable presumption in favor of the privilege's applicability should be entertained.

One possibly incriminating effect, as to past conduct, of the purchase of the stamp comes immediately to mind—even if we consider the annual $50 special tax wholly prospective in nature. First, the *Kahriger* court's view of the bookmaking "business" as something entered into at a specific instant in time, after due deliberation, much as a corporation "goes public", is not true to life or experience. A man quite often may drift into bookmaking, either by way of having been a "runner" or by virtue of having, over a period of time, increased his activity from single shot or social betting to a volume which merits a "business" label. Although, in both instances he would not previously have been liable for payment of the federal tax, *United States v. Calamaro,* 354 U. S. 351 (1957), *Kahn v. United States,* 251 F. 2d 160 (9 Cir. 1958), *United States v. Simon,* 241 F. 2d 308 (7 Cir. 1957), *George v. United States,* 346 F. 2d 137 (9 Cir. 1965), he doubtless had been violating state gambling laws. At the instant he becomes liable for the tax, or when he first becomes aware of the liability, he is faced with the choice of committing a federal crime by wilfully failing to pay the tax or of supplying investigatory leads which might result in conviction for his past activity in violation of state law.

State conspiracy statutes present even greater likelihood that compliance with the requirements of 4411 and 4412, however prospectively interpreted, will incriminate the taxpayer-registrant. The necessary listing of associates, even assuming Form 11-C's "Are you engaged . . ." and "Do you receive . . ." are translated somehow into the future tense, surely supports an inference that the taxpayer has *already agreed*, with those listed, to violate state law.[9] Since the payment of the tax, under federal law, is a condition precedent to actually going into business, payment and registration supply overt acts, thereby making the conspiracy offense complete. The overt acts, of course, need not be successful toward accomplishing the object of the conspiracy, *State v. Devine*, 149 Conn. 640,649, 183 A.2d 612,616 (1962), and need not be criminal acts in themselves. *United States* v. *Rabinowich*, 238 U.S. 78,86 (1915) The compulsory tax and registration does more than *tend* to incriminate the registrant—*it can convict him, of prior criminal acts, without any other evidence.* At least one state court has so held. *Acklen v. Tennessee*, 267 S. W. 2d 101 (Tenn. 1954).

3. Where Disclosures Are Compelled In An Area In Which The Specific Endeavor Is Illegal, The Privilege Should Apply Whether Registration Is Required Before Or After The Criminal Act

The heart of the *Kahriger* opinion is the Court's flat statement, relying only upon Professor Wigmore,[10] that the

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[9] One court has held, in affirming a conspiracy conviction based upon the wagering tax stamp, "It will not be gainsaid that common sense dictates the conclusion that these parties would not have gone to the trouble and expense complying with this federal law unless they fully intended to engage in the activity of which the tax was levied and paid." *Acklen v. Tennessee*, 267 S.W.2d 101, 104 (Tenn. 1954).

[10] 8 Wigmore (3d ed., 1940) § 2259 (c).

privilege relates "only to past acts, not to future acts that may or may not be committed". 345 U.S. at 32. We submit that nothing in Wigmore nor in the cases he relied upon justifies the application of the usual "record keeping" rules to the legislation here challenged; further, application of the *Kahriger* generalization "would permit the destruction of the privilege in all or almost all situations by ingeniously drawn legislation".[11] Morgan, The Privilege Against Self-Incrimination, 34 Minn.L.Rev.1 (1949).

The source, in Wigmore, of the Court's flat generalization concerning past and future acts is the Professor's discussion of statutes requiring certain records to be kept. The examples used were the "druggist's report of liquor sales, or a pawnbroker's record of pledges", 8 Wigmore at page 349, both *legal businesses*. It is clear that Wigmore's feeling that the privilege was inapplicable was largely based upon the legality of the "generic class of acts", 8 Wigmore at page 349, where "it is certain that only an occasional one will involve criminality". 8 Wigmore at page 352. Wigmore's "rule" would appear only to apply to legislation *"which merely requires beforehand a future report on a class of future acts among which a particular*

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[11] "Under the *Kahriger* rationale, the potential role of required information in the area of criminal prosecution appears almost unlimited. Assume, for example, the fancified possibility of an excise tax laid on the occupation of burglary, coupled with a registration statement requiring disclosure of the principle place of business—that is, where tools are kept and goods received or stored. These statements relating to future intent could, consistently with the *Kahriger* decision, provide prosecutors with a file of 'non-incriminatory' confessions before the fact which would be admissible into evidence at trial."

65 Colum L. Rev. 681,689, Required Information and The Privilege Against Self Incrimination, (1965)

one may or may not in the future be criminal . . ." 8 Wigmore at Pg. 349 (Emphasis in source)

Unlike the druggist and the pawnbroker, *all* of a gambler's business is illegal—at least in Connecticut. Any and all further acts will necessarily be criminal. Any compelled disclosure will incriminate. In a setting such as this one, the rules governing pawnbrokers are totally inapposite.

Of great significance here is the reason, or lack thereof, for the requirement of prior payment and registration. This clearly is not a licensing statute where the government, as with I.C.C. franchises, seeks to regulate the number of licensees or the areas in which they work—nor, like most state liquor licensing schemes, is the sovereign attempting to maintain minimum standards in its liquor outlets and permittees. Here, you simply pay the $50 tax, register, and receive your stamp—there are no other requirements for entering the business. The condition precedent requirement was either a Congressional accident, totally unrelated to the stated legislative purpose of raising revenue, or, much more likely, a deliberate attempt to subvert the privilege against self-incrimination.[12] To grant success to the sovereign by use of such a gimmick hardly maintains a "fair-state-individual balance". *Miranda* v. *Arizona*, 384 U.S. 436,460 (1966). Just as *Albertson* drew a meaningful distinction, where the privilege was concerned, between completion of the basically innocuous federal income tax return and the registration forms for Communists, here too we must differentiate between druggists and gamblers.

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[12] Professor Morgan's "ingeniously drawn legislation". 34 Minn. L. Rev. 1, (1949)

C. KAHRIGER AND LEWIS RUN COUNTER TO OUR BASIC SENSE OF JUSTICE EMBODIED IN THE FIFTH AMENDMENT PRIVILEGE

In more than a century and a half of constitutional interpretation, this Court, in its decisions defining the reach of the Fifth Amendment privilege against self-incrimination, has "groped for the proper scope of governmental power over the citizen". *Miranda v. Arizona,* 384 U.S. 436,460 (1966). As compulsion of one sort or another by the sovereign has manifested itself in increasingly sophisticated forms the privilege, reflecting "our most noble aspirations", *Murphy v. Waterfront Commission,* 378 U.S. at 55, has blossomed forth as a protection against "subtle encroachments on individual liberty". *Miranda v. Arizona,* 384 U.S. at 460. While the Court's defining of the privilege "as broad[ly] as the mischief against which it seeks to guard", *Counselman v. Hitchcock,* 142 U.S. 547, 562, has perhaps been most dramatic in the confession cases,[13] there have been other "subtle encroachments" which have recently been met.

One of the most important of these was the discarding of the so-called "dual sovereignty" rule of *United States v. Murdock, supra, Knapp v. Schweitzer,* 357 U.S. 371 (1958), and *Feldman v. United States,* 322 U.S. 487 (1944). In *Murphy v. Waterfront Commission, supra,* pointing to the inherent unfairness of an accused being "whipsawed" into incriminating himself under state or federal law, especially "in our age of 'cooperative federalism' ", the Court held that answers compelled in a state investigation might not

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[13] *Brown v. Mississippi,* 297 U.S. 278 (1936); *Chambers v. Florida,* 309 U.S. 227 (1940); *Haynes v. Washington,* 373 U.S. 503 (1963); *Escobedo v. Illinois,* 378 U.S. 478 (1964); *Miranda v. Arizona,* 384 U.S. 436 (1966).

be used in connection with a federal prosecution. 322 U.S. at 55-6, 79-80.

Murphy, however, has not totally done away with the "whipsaw". That registration and payment of the gambling tax not only incriminates, but is fully intended by the sovereign to incriminate, is amply demonstrated by the following statement of Mortimer M. Caplan, former Commissioner of Internal Revenue, writing in 1962 for the *Journal of Crime and Delinquency*, Vol. 8, in an article titled *The Gambling Business and Federal Taxes:*

> "The enforcement of local anti-gambling laws is a function of police powers reserved to the states by the Tenth Amendment. However, the Federal government can assist these local agencies to enforce such laws more effectively in a number of ways. Supplying information that is helpful to local law-enforcement is one very important aid. *As an example, the Internal Revenue Service makes available to those agencies the names and addresses of those who have paid wagering taxes.*
>
> . . .
>
> The District Director of Internal Revenue is required by law to maintain for public inspection an alphabetical listing of the names of all persons who have paid certain "special taxes". This includes both the excise and the occupational taxes on wagering.
>
> *The dilemma of the bookmaker is apparent. If he registers and pays the wagering taxes, he is generating evidence of his gambling activities—evidence that is available to local authorities. If he does not register, he exposes himself to the sanctions and penalties contained in the Federal Wagering tax laws."* p. 697. (Emphasis added)

"Non-incriminatory" registration disclosures compelled by threat of criminal prosecution have been and are being

used to obtain convictions for other criminal offenses, both state and federal. *Irvine v. California,* 347 U.S. 128 (1954); *State v. Curry,* 92 Ohio App. 1,109 N.E.2d 298 (1952); *Commonwealth v. Fiorini,* 202 Pa. Super. 88, 195 A.2d 119 (1963); *Acklen v. Tennessee,* 267 S.W.2d 101 (Tenn. 1963); *State v. Mills,* 229 La. 758, 86 So. 2d 895 (1956); *United States v. Zizzo,* 338 F. 2d 577 (7 Cir. 1964).

Regardless of whether, technically, this legislation looks to the past or future, it would be difficult to explain to someone convicted through use of his own registration statement that he had not been "compelled" to bear witness against himself.[14] A result similar to that reached in *Kahriger* and *Lewis* may be duplicated by legislatures at will by use of what is essentially a "gimmick" of legislation. The privilege should surely rise higher than congressional ingenuity; if it does not, we are all in trouble.

CONCLUSION

This Court has been scrupulous in protecting the citizen from governmental overreaching destructive of a "fair state-individual balance" in the criminal process; always, especially in recent years, has it jealously guarded from erosion—by legislature, judge, prosecutor or policeman—the Fifth Amendment privilege against self-incrimination, "the essential mainstay of our adversary system". *Miranda v. Arizona,* 384 U.S. at 460. The decisions in *Kahriger* and *Lewis* stand out strikingly, in the recent history of the Court, as exceptions both in their narrow unrealistic approach to the legislation in question and in the restrictive

[14] The literal use of "compelled" by the Court in Lewis is unjustified. In *Griffin v. California,* 380 U.S. 609 (1965), it was held that the making of the "assertion [of the privilege] costly", was an unconstitutional "compelling" proscribed by the Fifth Amendment.

scope there accorded the privilege. We ask the Court now to overrule both cases and to recognize the real violence done the privilege by the wagering tax. We ask that the judgments below be reversed and the indictments ordered dismissed.

Respectfully submitted

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APPENDIX

APPENDIX A

The following is the relevant portion of the opinion of the Court of Appeals for the Second Circuit in *United States* v. *Grassia,* 354 F.2d 27 (2 Cir. 1965).

FRIENDLY, *Circuit Judge:*

This is another appeal stemming from the raids relating to enforcement of the federal wagering tax at Bridgeport, Connecticut, on October 8, 1964. See *United States* v. *Costello,* 352 F. 2d 848 (2 Cir. 1965), *United States* v. *Piccioli,* 352 F. 2d 856 (2 Cir. 1965), and *United States* v. *Markis,* 352 F. 2d 860 (2 Cir. 1965). Alfred Grassia, represented by counsel and duly questioned by Judge Clarie at a term of the District Court for Connecticut at Hartford, to which, at his request, his case had been transferred for trial on his not guilty plea, pleaded *nolo contendere* to one count of a two-count indictment charging, under 26 U. S. C. §7203, willful failure to pay the special occupational tax relating to wagers imposed by 26 U. S. C. §4411. The other count was then dismissed at the Government's request. His points on appeal from the resulting conviction fall into two categories. The first repeats the same constitutional attacks on the federal wagering tax statutes that were advanced in the earlier cases. His other point is that the conscious generation of publicity by the Government and statements by Chief Judge Timbers in the course of other proceedings in January and February, 1965, prior to Grassia's change of plea,[1] see *United States* v. *Costello, supra,* 352 F. 2d at ——, *United States* v. *Piccioli, supra,* 352 F. 2d ——, so prejudiced his opportunity for a fair trial that the indictment should have been dismissed.

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[1] The judge's statements were the basis of one of several motions by Grassia to dismiss the indictment or for a continuance.

The first group of contentions, challenging the constitutionality of the federal wagering tax statutes, survive the plea of *nolo contendere,* as the Government concedes. But, so far as this Court is concerned, they have been determined adversely to Grassia by *United States* v. *Costello, supra,* 352 F. 2d 848. Recognizing that the rationale of *Albertson* v. *Subversive Activities Control Board,* 382 U. S. 70 (1965), announced subsequent to our *Costello* opinion, may lead the Supreme Court to overrule its previous decisions in *United States* v. *Kahriger,* 345 U. S. 22 (1953), and *Lewis* v *United States,* 348 U. S. 419 (1955), insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination, we consider that issue more appropriate for that Court's determination.

APPENDIX B

Amendment V, Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

26 U.S.C. §4401

(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager.—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

26 U.S.C. §4411

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

26 U.S.C. §4412

(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

26 U.S.C. §4422

The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from

any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes.

26 U.S.C. §4423

Notwithstanding section 7605 (b), the books of account of any person liable for tax under this chapter may be examined and inspected as frequently as may be needful to the enforcement of this chapter.

26 U.S.C. §4901

(a) Condition precedent to carrying on certain business.—No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wagering), 4461 (2) (coin-operated gaming devices), 4721 (narcotic drugs), or 4751 (marihuana) until he has paid the special tax therefor.

(b) Computation.—All special taxes shall be imposed as of on the first day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for 1 year, and in the latter case it shall be reckoned proportionately, from the first day of the month in which the liability to a special tax commenced, to and including the 30th day of June following.

(c) How paid.—

(1) Stamp.—All special taxes imposed by law shall be paid by stamps denoting the tax.

26 U.S.C. §6011

(a) General rule.—When required by regulations prescribed by the Secretary or his delegate any person made liable for any tax imposed by this title, or for the collection

thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

. . .

26 U.S.C. §7203

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of secion 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 C.F.R. §44.4412-1 (Relevant Portions)

. . .

(b) . . .

(2) Each person engaged in the business of accepting wagers on his own account shall report on Form 11-C the name and address of each place where such business will be conducted and the name, address, and number appearing on the special (occupational) stamp of each agent or employee who may receive wagers on his behalf. Thereafter, a return shall be filed on Form 11-C, marked "Supplemental", each time an additional employee or agent is engaged to receive wagers. Such supplemental return shall be filed not later than 10 days after the date such additional em-

ployee or agent is engaged to receive wagers and shall show the name, address, and number appearing on the special (occupational) stamp of each such agent or employee. As to a change of address, see § 44.4905-2.

(3) Each agent or employee who receives wagers for or on behalf of a person engaged in the business of accepting wagers on his own account shall report on Form 11-C the name and residence address of each person (i.e., individual, partnership, corporation, etc.) on whose behalf wagers are to be received. Thereafter, the agent or employee shall file a return on Form 11-C, marked "Supplemental", each time he is engaged or employed to receive wagers for a person or persons other than the person or persons previously reported on Form 11-C. Such supplemental return shall be filed not later than 10 days after the date he is engaged to receive wagers and shall show the name, business address, or, if none, the residence address of the person or persons by whom he is engaged to receive wagers.

Section 53-295, Conn. Gen. Stats.

Any person, whether as principal, agent or servant, who owns, possesses, keeps, manages, maintains or occupies, or assists in keeping, managing, maintaining or occupying, any building, room, office, park, ground, enclosure or place with apparatus, books or boards or any device for the purpose of making, recording or registering bets or wagers, or of buying or selling pools upon the result of any trial or contest of skill, speed or endurance of man, beast, bird or machine, or upon the result of any game, competition, political nomination, appointment or election, whether such trial, contest, game, competition, nomination, appointment or election takes place either within or without this state, or where pool selling of any kind, either directly

or indirectly, is permitted or carried on, or in which the business of transmitting money to any race track or other place there to be placed or bet on any horse race, game, sport, competition, nomination, appointment or election, whether within or without this state, is permitted or carried on in any manner, and any person who keeps a place which is reputed to be a place resorted to for the purpose of sellings pools upon the result of any election, and any person who makes, records or registers any such wagers or bets, or buys or sells, or is concerned in buying or selling, any such pools, or in carrying on the business of the transmission of money to any race track or other place there to be bet or placed on any horse race, game, sport, competition, nomination, appointment or election, whether within or without this state, and any person who, being the owner, lessee or occupant of any building, room, park, ground, enclosure or place, or part thereof, knowingly permits the same to be used or occupied for any such purpose, on the first conviction shall be fined not more than one thousand dollars or be imprisoned not more than one year or be both fined and imprisoned; and on a second or subsequent conviction shall be fined not less than five hundred dollars nor more than three thousand dollars and be imprisoned not less than thirty days nor more than three years; and each day of such owning, keeping, occupying, permitting or transmitting shall constitute a separate offense. Any person who becomes the custodian or depositary of any pools, money, property or thing of value, in any manner wagered or bet upon such result, or of any apparatus of any kind used for the purpose of assisting in buying or selling any such pools or making any such wagers or bets, shall be punished in like manner. The provisions of this section shall not prohibit the giving of purses or premiums for any trial or contest of skill, speed or endurance of man, beast, bird or

machine and the charging of an admission or entrance fee to any contestant in any such trial or contest.

Section 53-298, Conn. Gen. Stats.

Policy playing; gaming by use of lottery slips or tickets. Any person, whether a principal, agent or servant, who owns, possesses, keeps, manages or maintains, or assists in keeping, managing or maintaining, any policy-office or place where the game of chance, business, scheme or occupation, commonly known as policy, is, or is reputed to be, played or carried on, or any place where bets or wagers are, or are reputed to be, made upon the result of a drawing in any lottery, or of the drawing of any numbers of chance, or any place which is, or is reputed to be, resorted to for any such purposes in whole or in part, or writes, sells, bargains, exchanges, gives, transfers, delivers, buys, collects or receives, or is concerned in writing, selling, bargaining, exchanging, giving, transferring, delivering or receiving, any policy slips, tickets, tokens, numbers or chances, used in said game of chance, business, scheme or occupation, or in wagering or betting upon the result of any drawing in any lottery, or in any drawing of any numbers by chance, or collects or receives, or is concerned in receiving or collecting, any money or other valuable thing for any such slips, tokens, numbers or chances, or makes, manufactures or keeps, or is the custodian of, any slips, tokens, papers, books, records or registers of bets or wagers, or any appliances or apparatus used for any such purposes, and any owner, mortgagee in possession, lessee or occupant of any building, room, structure or place, or part thereof, who knowingly permits the same to be used or occupied for any of the purposes mentioned in this section, for a first offense, shall be fined not more than one thousand dollars or imprisoned not more than one year, or both; for a second or

subsequent offense, shall be fined not less than five hundred dollars nor more than three thousand dollars or imprisoned not more than three years, or both; and each day of any such above-mentioned activity shall constitute a separate offense. Any person who plays or takes part in any such game of chance, business, scheme, occupation, betting or wagering, in or out of any such office or place, or frequents any place or office where the game of chance, business, scheme or occupation, commonly known as policy, is, or is reputed to be, played or carried on in whole or in part, or any place where wagers or bets are, or are reputed to be, made upon the result of any drawing in any lottery, or of any drawing of any numbers by chance, or frequents any place which is, or is reputed to be, resorted to for any of such purposes in whole or in part, for a first offense, shall be fined not more than one hundred dollars or imprisoned not more than six months or both; for a second offense, shall be fined not more than two hundred fifty dollars or imprisoned not more than one year, or both; and, for a subsequent offense, shall be fined not more than five hundred dollars or imprisoned not more than three years, or both.

§54-197, Conn. Gen. Stats.

Any person who combines, confederates or agrees with another or others to accomplish any unlawful object by lawful means, or any lawful object by unlawful means, or any unlawful object by unlawful means, if one or more of such persons do any act in furtherance of such combine, confederation or agreement, shall be fined not more than five thousand dollars or imprisoned not more than fifteen years or both, provided, if the crime which is the object of such combination, confederation or agreement is a misdemeanor, such person shall be subject to the same penalty as is provided by statute for the commission of the misde-

meanor. No officer or member of any lawful organization shall be held liable for the unlawful acts of individual officers members or agents of such organization except upon proof of participation in or authorization of such acts or of the ratification thereof.